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730906—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 890

SMITH, RICHEY & CO., INC., ET AL., PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

No opinion was rendered by the United States Emergency Court of Appeals.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on December 17, 1946 (R. 39). The petition for a writ of certiorari was filed on January 15, 1947. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act, as amended (50 U. S. C. App., Supp. V, 924 (d)),

making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether the United States Emergency Court of Appeals erred in dismissing petitioners' complaint brought under Section 204 (a) of the Emergency Price Control Act, with leave to petitioners to move to reinstate the complaint in the event that any proceeding should be brought against them under Section 205 of that Act based upon any provisions of the orders and regulations objected to in the complaint, when the regulations and orders were no longer in effect and there was no case or controversy as to their past validity existing between the parties to the proceeding.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (herein sometimes termed the Act), are set out in the Appendix, *infra* pp. 9–16.

STATEMENT

This proceeding was instituted by protests filed with the Price Administrator in January, 1945, under Section 203 (a) of the Act by the petitioners, who are meat wholesalers in the New York City Area, against the provisions of Revised Maximum Price Regulations Nos. 148, 169, and 239 covering meats (R. 1).

By order of the Administrator dated February 19, 1945, the protests were consolidated and the petitioners were given an opportunity to present further evidence. Following this order, on application of the petitioners, the Administrator issued six orders extending the time during which petitioners might submit further evidence until February 15, 1946, and the additional evidence was filed on February 14, 1946. (R. 19.) During the month of May, 1946, counsel for the petitioners and the Administrator entered into informal negotiations concerning the disposition of the protest proceedings, but due to the temporary decontrol of meat during July and August, 1946, no further action was taken by either party to the proceedings (R. 19, 24). On September 18, 1946, the Administrator ordered the evidential record closed and referred the proceedings to a Board of Review. On October 14, 1946, a hearing was held by the Board of Review, but on October 15, 1946, meat was decontrolled and the Administrator entered an order dismissing the protests as moot. (R. 20.)

Petitioners filed their complaint in the Emergency Court of Appeals on November 13, 1946 (R. 1–18), and the Price Administrator filed a motion to dismiss the complaint on the ground that the proceeding had become moot (R. 18–19), and on December 17, 1946, the Emergency Court of Appeals entered judgment dismissing the com-

plaint, "with leave to the complaints to move to reinstate the complaint in the event that any proceeding should be brought against complainants under Section 205 of the Emergency Price Control Act of 1942, as amended, based upon any provisions of the orders and regulations objected to in the complaint, and jurisdiction of the cause is hereby retained for that purpose" (R. 39).

ARGUMENT

Petitioners contend that the Act entitles them to a judicial determination of the retroactive validity of regulations in which they no longer have any legal interest. This contention ignores the constitutional requirement that a case or controversy must exist between the parties litigant before a federal court created under Article III of the United States Constitution can be vested with jurisdiction to adjudicate their differences. In the case at bar, the regulations involved are no longer in force, and the petitioners concede that prospective relief could not be granted (Pet. 11). The petitioners endeavor to maintain, however, that they are entitled to relief from the retroactive effect of the regulations involved because the possibility that criminal proceedings may yet be instituted against them is not entirely foreclosed.[1] And they make this conten-

[1] The court below dismissed the complaint with leave to petitioners to reinstate it should proceedings be brought against them under Section 205 of the Act, based upon the

tion without showing that any such proceedings are actually pending against them;[2] that they are in possession of any information which reasonably leads them to believe that they will be charged with having violated the pertinent regulations during the time those regulations were currently in force and effect; or that they have any agreements the enforceability of which depends upon the invalidity of the regulations involved. The contention is patently unsound.

If the petitioners' argument that the mere possibility of enforcements proceedings against them entitles them to a determination of retroactive validity[3] were sound, every person who was at one

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regulations involved, and retained jurisdiction for that purpose. Petitioners contend that the court below erred in not including in the reservation criminal proceedings which may possibly be brought against them under Section 37 of the Criminal Code or under the New York state laws. The petitioners made no request to the court below that any such reservations be made in its judgment, covering liability under either Section 205, a reservation under which was included by the court, or under the other provisions of law to which they now point.

[2] It was alleged in the complaint that petitioners had an interest in a retroactive determination of the validity of the regulations involved because of criminal proceedings pending against two of them for violations of the Administrative Code of the City of New York (R. 3). At the time the Administrator filed his motion to dismiss, however, these proceedings had been terminated (R. 21).

[3] Since *Montgomery Ward & Co.* v. *Bowles*, 147 F. 2d 858 (E. C. A.), the Emergency Court of Appeals has ruled that the period in controversy in a proceeding for a declaratory judgment as to past validity of a regulation was necessarily

time subject to a regulation and who might now be interested in litigating the validity of the regulation for academic reasons, would have similar standing. Both the Administrator and the Emergency Court of Appeals might thus become engaged in litigation which could have no legal effect. It is submitted that such a proceeding is not a case or controversy within the meaning of Article III of the United States Constitution. The Emergency Court of Appeals has no jurisdiction to pass upon moot or abstract issues. Cf. *United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *Willing* v. *Chicago Auditorium Ass'n*, 277 U. S. 274.

There is nothing in the language of the Act or in its legislative history to indicate that the Congress intended that the Emergency Court of Appeals should be required to consider the validity of price regulations, either prospectively or retroactively, at the request of persons having no legal interest in them. In the absence of clear and unequivocal expression to that effect, it would be absurd to impute to the legislature an intention that every person who at one time was subject to a regulation, but who has merely a speculative legal interest therein after its abrogation, should

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only the period involved in the enforcement proceedings. Where, as here, therefore, no enforcement proceedings are pending, the period "in controversy" would necessarily be shortened daily as the statute of limitations effectively reduces even the possibility of such proceedings.

have the right to take up the time of the Emergency Court of Appeals and the public officials in carrying on litigation and obtaining judgments concerning the retroactive validity of the regulation, which may have no legal effect upon the parties litigant. Such a construction of the judicial review provision would hardly be compatible with Article III of the Constitution.

The regulations involved in the case at bar were no longer in force when the complaint was filed in the Emergency Court of Appeals, and the petitioners have failed to show that they have been charged with a violation of such regulations while they were in force, or that they have reasonable grounds for believing that they will be so charged in the future. Nor have they shown that they are parties to any other cases or controversies in connection with which a judgment on the validity of the regulations is essential.[4] Consequently, they have not stated or proved that they have a legal interest in the retro-

[4] The petitioners rely on the decisions of this Court in *Utah Junk Co.* v. *Porter*, 328 U. S. 39; *Collins* v. *Porter*, 328 U. S. 46; *Thomas Paper Stock Co.* v. *Porter*, 328 U. S. 50, holding that the Emergency Court of Appeals had jurisdiction to consider the validity of regulations after they had been superseded. In the *Utah Junk Co.* case, the petitioner, at the time of the proceeding, was involved in a controversy in which legal interests were involved, and in the *Collins* and *Thomas Paper Stock Co.* cases, the petitioners had been charged with continuing liability growing out of violations committed while the superseded provisions of the regulations were in force. The decisions in those cases are clearly not controlling here.

active effect of the regulations involved sufficient to invoke the jurisdiction of the Emergency Court of Appeals. The Declaratory Judgment Act (48 Stat. 955; Jud. Cod., § 274d; 28 U. S. C. 400) does not entitle the petitioners to relief in the case at bar, for that Act limits the proceedings which may be brought under it to controversies which are such in the constitutional sense. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227. Cf *Montgomery Ward & Co.* v. *Bowles, supra.* Hence, the court below committed no error, in dismissing the complaint in this case.

CONCLUSION

The judgment of the court below is correct, and there is no warrant for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY, 1947.

APPENDIX

I. The pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in

support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effective-

ness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Su-

preme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price

schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in

accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judg-

ment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

SEC. 205. (c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the

violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found: *Provided, however,* That all suits under subsection (e) of this section shall be brought in the district or county in which the defendant resides or has a place of business, an office, or an agent. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

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